Supreme Court, U.S.
FILED
JAN 8 1993
OFFICE OF THE CLERK

No. 92-351

(8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN RESOURCES,
Petitioner,

v.

SAMUEL DOE, by His Mother and Next Friend,
MARY DOE, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE ARC OF KENTUCKY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH), TASH OF KENTUCKY, THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE JOSEPH P. KENNEDY, JR. FOUNDATION, and THE AMERICAN CIVIL LIBERTIES FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES W. ELLIS
Counsel of Record
MAUREEN A. SANDERS
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

38 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
CONTEXT OF THE CASE	3
ARGUMENT:	
I. THIS COURT SHOULD REJECT PETITIONER'S REQUEST FOR AN ADVISORY OPINION ON ISSUES NOT PRESENTED IN THE PETITION FOR CERTIORARI	6
II. THE "MASSIVE CURTAILMENT OF LIBERTY" SUFFERED BY ADULTS WITH MENTAL RETARDATION WHO FACE CIVIL COMMITMENT SHOULD BE RECOGNIZED AS BEING AMONG THE WEIGHTIEST OF CONSTITUTIONAL INTERESTS	8
A. Commitment of Adults to a Mental Retardation Institution Constitutes a Loss of Physical Freedom Fully Equivalent to the Deprivation in Other Kinds of Commitment	10
B. The Liberty Interest of Individuals at All Levels of Mental Retardation is Equally Deserving of Constitutional Protection	10
C. The Curtailment of Liberty Inherent in Any Commitment is Exacerbated By the Likelihood that the Individual Will Be Subjected to Involuntary Medication with Psychotropic Drugs	13
D. The Stigmatization of Civil Commitment and Its Official Attachment of the Label of Mental Retardation is Keenly Felt By Individuals Committed to These Institutions	15

TABLE OF CONTENTS—Continued

	Page
E. The Massive Curtailment of Liberty that Accompanies Commitment Includes the Possibility of Aversive Conditioning, Potential Physical Abuse, Regression of Previous Skills, and the Loss of Freedom of Association	16
III. THE LIBERTY INTEREST OF PEOPLE WITH MENTAL RETARDATION DESERVES RIGOROUS PROTECTION UNDER THE DUE PROCESS CLAUSE	18
A. Procedures for Civil Commitment of People with Mental Retardation Must Assure a Fair and Accurate Adjudication of the Statutory Criteria	18
B. The Kentucky Statutory Scheme at Issue In This Case Fails to Provide Adequate Procedural Protections	21
IV. EQUAL PROTECTION REQUIRES THAT STATES ACT EVENHANDEDLY WHEN DEPRIVING INDIVIDUALS OF THEIR PHYSICAL LIBERTY	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
Addington v. Texas, 441 U.S. 418 (1979)	4, 15, 21, 28
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)	3, 10, 12, 13, 16, 29
Clark v. Cohen, 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir. 1986), *cert. denied*, 409 U.S. 962 (1986)	20
Douglas v. California, 372 U.S. 353 (1963)	28
Flast v. Cohen, 392 U.S. 83 (1968)	7
Foucha v. Louisiana, 112 S. Ct. 1780 (1992)	10, 27, 29
In re Gault, 387 U.S. 1 (1967)	28
Halderman v. Pennhurst, 451 U.S. 1 (1981)	4
Humphrey v. Cady, 405 U.S. 504 (1972)	8
Irvine v. California, 347 U.S. 128 (1954)	7
Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981)	10
Lelsz v. Kavanagh, 673 F. Supp. 828 (N.D. Tex. 1987), *rev'd on other grounds*, 824 F.2d 372 (5th Cir. 1987)	17
Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976)	4
Mathews v. Eldridge, 424 U.S. 319 (1976)	11, 18
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	13
O'Connor v. Donaldson, 422 U.S. 563 (1975)	19, 21
Parham v. J.R., 442 U.S. 584 (1979)	21
Penry v. Lynaugh, 492 U.S. 302 (1989)	10, 12
Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976)	25
Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992)	26
Princeton University v. Schmid, 455 U.S. 100 (1982)	7
Riggins v. Nevada, 112 S. Ct. 1810 (1992)	14
Santosky v. Kramer, 455 U.S. 745 (1982)	24
Thomas S. v. Flaherty, 699 F. Supp. 1178 (W.D. N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 373 (1990)	15

TABLE OF AUTHORITIES—Continued

	Page
United States v. Salerno, 481 U.S. 739 (1987)	10
Vitek v. Jones, 445 U.S. 480 (1980)	8, 13, 17, 21
Washington v. Harper, 494 U.S. 210 (1990)	14
Youngberg v. Romeo, 457 U.S. 307 (1982)	17
Zablocki v. Redhail, 434 U.S. 374 (1978)	27
Zinermon v. Burch, 494 U.S. 113 (1990)	4
STATUTES AND COURT RULES:	
Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. II 1990)	8, 12
Individuals with Disabilities Education Act, 20 U.S.C.A. § 1401(a)(20)(D) (Supp. 1992)	13
Ky. Rev. Stat. Ann. § 202B.010 (Baldwin 1991)	9
Ky. Rev. Stat. Ann. § 202B.040 (Baldwin 1991)	19
Ky. Rev. Stat. Ann. § 202B.040(3) (Baldwin 1991)	7
Ky. Rev. Stat. Ann. § 202B.160(3) (Baldwin 1991)	21, 23, 24, 27
N.M. Stat. Ann. § 43-1-13 (Repl. Pamp. 1989)	4
Fed. R. Civ. P. 24	24
Fed. R. Civ. P. 24(a)	24
U.S. Sup. Ct. R. 24.1(a)	7
MISCELLANEOUS:	
AAMR, *Classification in Mental Retardation* (Herbert J. Grossman ed., 1983)	9, 10
AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992)	9, 11
A.B.A. Commission on the Mentally Disabled, *Right to Services, in Disabled Persons and the Law: State Legislative Issues* 409-52 (Sales et al. eds., 1982) (model statute)	4
Agran & Singh, *Pharmacological Intervention*, in *Handbook of Mental Retardation*, 347 (J.L. Matson & J.A. Mulick eds., 2d ed. 1991)	14
Angrosino, *Metaphors of Stigma: How Deinstitutionalized Mentally Retarded Adults See Themselves*, 21 J. Contemp. Ethnography 171 (1992)	16

TABLE OF AUTHORITIES—Continued

	Page
Bates, Smeltzer & Arnoczky, *Appropriate and Inappropriate Use of Psychotherapeutic Medications for Institutionalized Mentally Retarded Persons*, 90 Am. J. Mental Deficiency 363 (1986)	14
Blatt, *The Conquest of Mental Retardation* (1987)	10
Braddock et al., *The State of the States in Developmental Disabilities* (1990)	6
Bogden & Taylor, *Inside Out: The Social Meaning of Mental Retardation* (1982)	16
Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1108 (1972)	17
Dexter, *A Social Theory of Mental Deficiency*, 62 Am. J. Mental Deficiency 920 (1958)	13
Dybwad, R., *Perspectives on a Parent Movement: The Revolt of Parents of Children with Intellectual Limitations* (1990)	12
Edgerton, *A Case of Delabeling: Some Practical and Theoretical Implications, in Culture and Retardation: Life Histories of Mildly Retarded Persons in American Society* 101 (L. L. Langness & Harold G. Levine eds., 1986)	20
Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967)	15, 16
Ficker-Terrill & Rowitz, *Choices*, 29 Mental Retardation 63 (1991)	17
Frohboese & Sales, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution*, 4 Law & Human Behavior 1 (1980)	22
Gibbons, *Stigma Perception: Social Comparison Among Mentally Retarded Persons*, 90 Am. J. Mental Deficiency 98 (1985)	16
Hill, Balow & Bruininks, *A National Study of Prescribed Drugs in Institutions and Community Residential Facilities for Mentally Retarded People*, 21 Psychopharmacology Bull. 279 (1985)	14

TABLE OF AUTHORITIES—Continued

	Page
Hill & Lakin, *Classification of Residential Facilities for Individuals with Mental Retardation*, 24 Mental Retardation 107 (1986)	5
Intagliata & Rinck, *Psychoactive Drug Use in Public and Community Residential Facilities for Mentally Retarded Persons*, 21 Psychopharmacology Bull. 268 (1985)	14
"I've Seen It All!": Lives of Older Persons with Mental Retardation in the Community (Edgerton & Gaston eds., 1991)	16
Lakin et al., *Longitudinal Change and Interstate Variability in the Size of Residential Facilities for People with Mental Retardation*, 28 Mental Retardation 343 (1990)	5
Lakin et al., *Longitudinal Patterns in ICF-MR Utilization, 1977-1986*, 27 Mental Retardation 149 (1989)	5
Larson & Lakin, *Parent Attitudes About Residential Placement Before and After Deinstitutionalization: A Research Synthesis*, 16 J. Ass'n for Persons with Severe Handicaps 25 (1991)	22
Larson & Lakin, *Deinstitutionalization of Persons with Mental Retardation: Behavioral Outcomes*, 14 J. Ass'n for Persons with Severe Handicaps 324 (1989)	5
Marchetti & McCartney, *Abuse of Persons with Mental Retardation: Characteristics of the Abused, the Abusers, and the Informers*, 28 Mental Retardation 367 (1990)	17
McNair & Rusch, *Parent Involvement in Transition Planning*, 29 Mental Retardation 93 (1991)	13
Nowak & Rotunda, *Constitutional Law*, § 14.41 (4th ed. 1991)	28
O'Neill et al., *The Impact of Deinstitutionalization on Activities and Skills of Severely/Profoundly Mentally Retarded Multiply-Handicapped Adults*, 6 Applied Research in Mental Retardation 361 (1985)	5
Plotkin & Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 Stan. L. Rev. 637 (1979)	14

TABLE OF AUTHORITIES—Continued

	Page
Reiss & Benson, *Awareness of Negative Social Conditions Among Mentally Retarded, Emotionally Disturbed Outpatients*, 141 Am. J. Psychiatry 88 (1984)	15
Rothman & Rothman, *The Willowbrook Wars* (1984)	17, 22
Scheerenberger, *Public Residential Facilities: Status and Trends*, 19 Mental Retardation 59 (1981)	5
Smull & Harrison, *Supporting People with Severe Reputations in the Community* 5-6 (Alexandria, Va., National Association of State Mental Retardation Program Directors 1992)	7, 17
Stanovich & Stanovich, *Speaking for Themselves: A Bibliography of Writings by Mentally Handicapped Individuals*, 17 Mental Retardation 83 (1979)	16
Szivos & Griffiths, *Group Processes Involved in Coming to Terms With a Mentally Retarded Identity*, 28 Mental Retardation 333 (1990)	16
Transitions to Adult Life for People with Mental Retardation—Principles and Practices (Ludlow, Turnbull & Luckasson eds., 1988)	13
Turner, *Yes I Am Human: Autobiography of a "Retarded Career,"* 8 J. Community Psychology 3 (1980)	20
Valpey, *The Psychological Impact of 18 Years in a Board and Care Home*, 10 J. Community Psychology 95 (1982)	7, 20
Wehman et al., *Transition from School to Work: New Challenges for Youth with Severe Disabilities* (1988)	13
Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Inquirer: The Philadelphia Inquirer Magazine, May 27, 1984, at 18	17
Zetlin & Turner, *Self-Perspectives on Being Handicapped: Stigma and Adjustment, in Lives in Process: Mildly Retarded Adults in a Large City* 93 (Edgerton ed., 1984)	16

INTEREST OF AMICI CURIAE

Amici curiae include national and Kentucky organizations of professionals and family members concerned with the services provided to people who have mental retardation.[1]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals working in the field of mental retardation.

THE ARC is an association of parents, family members, professionals and persons with mental retardation devoted to promoting the interests of people with mental retardation and their families. The ARC has a national membership of over 120,000 and is led by volunteer parents. THE ARC OF KENTUCKY is a state chapter of the ARC.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is an organization of over 8,000 teachers, parents, physicians and other professionals dedicated to developing educational and habilitative services for persons with severe disabilities. TASH OF KENTUCKY is a state chapter of TASH.

THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED (AAUAP) is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary organization of psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of mental disabilities.

---

[1] Petitioner and Respondents in this case have consented to the filing of this brief.

THE JOSEPH P. KENNEDY, JR. FOUNDATION, established in 1946, has as its objectives the prevention of mental retardation and the improvement of the way in which society deals with persons who have mental retardation.

THE AMERICAN CIVIL LIBERTIES UNION (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights and this nation's civil rights laws.

Unlike the parties in this case, and unlike the *amicus* organizations supporting Petitioner, the organizations joining this brief take no position on whether the standard of proof selected by Kentucky for the commitment of people with mental retardation to residential institutions should be "clear and convincing evidence" or "beyond a reasonable doubt." Our organizations recognize that the Kentucky legislature could select the intermediate level of proof for both mental illness and mental retardation commitments. Similarly, the precise procedures by which parental opinions are ascertained in individual commitment cases in Kentucky are not the central concern of this brief.

Amici are deeply concerned, however, about the procedures by which individuals are admitted and committed to mental retardation facilities and programs. As a result, *amici* have a substantial interest in the doctrinal standards to be employed in evaluating the constitutionality of statutory schemes for the commitment of people with mental retardation to large residential institutions. The equal protection and due process issues raised in this case are matters of great importance to our organizations and their members. *Amici* are concerned that in resolving the relatively narrow constitutional questions presented in the grant of certiorari, the Court recognize the magnitude of the liberty interest of people with mental retardation and the complex considerations involved when

a state chooses to grant procedural protections to one group that it denies to other similarly situated groups.

SUMMARY OF ARGUMENT

Civil commitment to an institution deprives people with mental retardation of an extraordinarily wide range of liberty interests. Not only do they lose their physical freedom, they also experience serious stigmatization, are likely to be involuntarily medicated with psychotropic drugs, and may face aversive behavior modification programs, physical abuse, and an institutionally-caused loss of crucial skills that they possessed before they were committed. Upon commitment they also lose their freedom to choose their daily activities and associates. People with mental retardation truly experience this as a massive curtailment of liberty.

Rather than issuing an advisory opinion on general and speculative constitutional issues, this Court should confine its ruling to the narrower questions in the writ of certiorari. We believe that the Kentucky statutes at issue violate the Equal Protection and Due Process Clauses, and that the opinion of the Court of Appeals should be affirmed.

CONTEXT OF THE CASE

Laws for the commitment of people with mental retardation were enacted at the same time that large institutions were developed to accomplish the lifelong segregation of a greatly feared population.[2] In many states, those laws, or major portions of them, remain on the books. There have been calls for reform of these laws

---

[2] The background of these laws, including numerous historical examples, is set forth in the text and appendices to the *amici curiae* briefs to this Court by the American Association on Mental Deficiency (now AAMR) and by the Association for Retarded Citizens (now The ARC) in the case of City of *Cleburne v. Cleburne Living Center* (No. 84-468).

to make them more responsive to our understanding of mental retardation and the rights of citizens who have that label. *E.g.*, A.B.A. Commission on the Mentally Disabled, *Right to Services, in Disabled Persons and the Law: State Legislative Issues* 409-52 (Sales et al. eds., 1982) (model statute). Progress toward achieving reform was initially slow, in part because litigation on behalf of institutional residents tended to focus on institutional conditions and deinstitutionalization rather than procedural protections. *See, e.g., Halderman v. Pennhurst*, 451 U.S. 1 (1981). By contrast, there was substantial litigation about the procedural rights of people with mental illness whose commitment was sought. *See, e.g., Addington v. Texas*, 441 U.S. 418 (1979); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis 1972), *vacated and remanded*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

Currently, some states have no laws for the commitment of people with mental retardation, and treat all potential clients as "voluntary," regardless of their level of disability or their competence to give or withhold consent. *Cf. Zinermon v. Burch*, 494 U.S. 113 (1990). Other states have commitment laws on the books, but seldom use them, treating practically all commitments as "voluntary." This appears to have been the situation in Kentucky prior to this litigation. Pet. Br. at 10. A few states have adopted commitment laws for people with mental retardation and employ them regularly. *E.g.*, N.M. Stat. Ann. § 43-1-13 (Repl. Pamp. 1989).

Nationally, these procedural developments have coincided with substantial changes in the usage of the institutions themselves. As of 1991, 79,407 people lived in state mental retardation institutions, which represents a reduction of well over 50% from the 1967 figure of 194,650. (To put these figures in context, the 1991 total

is lower than the institutional population in 1936.) *See* Lakin, et al., *Longitudinal Change and Interstate Variability in the Size of Residential Facilities for People with Mental Retardation*, 28 Mental Retardation 343 (1990). (The above figures were updated for *amici* to June 30, 1991, by Professor Lakin and the staff of the Institute on Community Integration at the University of Minnesota.)[3]

One consequence of this decrease in population is that, starting in the 1970s, an increasing percentage of the institutional population were people with relatively severe disabilities. Nonetheless, a substantial minority continued to consist of individuals with what was then classified as mild or moderate mental retardation. *See* Scheerenberger, *Public Residential Facilities: Status and Trends*, 19 Mental Retardation 59 (1981). During the same period, mental retardation professionals developed remarkably successful techniques in community settings for serving people with mental retardation who need extensive or pervasive supports. *See* O'Neill et al., *The Impact of Deinstitutionalization on Activities and Skills of Severely/Profoundly Mentally Retarded Multiply-Handicapped Adults*, 6 Applied Research in Mental Retardation 361 (1985); Larson & Lakin, *Deinstitutionalization of Persons with Mental Retardation: Behavioral Outcomes*, 14 J. Ass'n for Persons with Severe Handicaps 324 (1989). It can now be said with confidence that there is no level or type of mental retardation that requires services or supports that are found only in an institution.[4]

---

[3] *See generally* Lakin et al., *Longitudinal Patterns in ICF-MR Utilization, 1977-1986*, 27 Mental Retardation 149 (1989) (describing the ICF-MR program and providing state-by-state statistics on its implementation).

[4] For a discussion of the variety of community programs, *see* Hill & Lakin, *Classification of Residential Facilities for Individuals With Mental Retardation*, 24 Mental Retardation 107 (1986). The process of developing procedures for admission to community living arrangements is at a very early stage.

These factors have accelerated the trend toward closing the large (and costly) institutions by moving residents into community living arrangements. *See* Braddock et al., *The State of the States in Developmental Disabilities* 14-15 (1990). For example, Pennhurst, an institution which has occupied this Court's attention on several occasions in the past, is now closed. New Hampshire has recently become the first state to close all its mental retardation institutions, and several other states are scheduled to do the same in the next few years.

These developments make caution appropriate in reaching beyond the questions directly presented by the petition for certiorari. *Amici* believe that the development of case law in the lower courts and advances in our understanding about mental retardation services will provide assistance to this Court should these broader issues reach it in the future.

ARGUMENT

I. THIS COURT SHOULD REJECT PETITIONER'S REQUEST FOR AN ADVISORY OPINION ON ISSUES NOT PRESENTED IN THE PETITION FOR CERTIORARI.

This Court has not had occasion, to date, to address issues of procedural due process regarding the institutional commitment of adults with mental retardation. Unlike the procedures for mental health commitment, on which there has been a substantial body of scholarly exploration and case law for more than twenty years, commitment of individuals with mental retardation is an area that scholars, legislatures, and lower courts are only beginning to address. *Amici* urge this Court to avoid unnecessarily broad language or dicta in this case that might, by inadvertence, prematurely influence the appropriate resolution of these questions that are so vitally important in protecting the liberty of citizens whom

the state seeks to label as mentally retarded and to confine in large institutions.[5]

Petitioner and supporting *amici* have attempted to "smuggle" into this case much broader due process issues than those within the scope of the questions on which certiorari was granted. *Cf. Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion); Sup. Ct. R. 24.1(a). In effect, Petitioner asks this Court for an advisory opinion on the moot question of whether a since-repealed statute was constitutional prior to its repeal, *cf. Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam), and whether Kentucky's 1990 legislation was constitutionally unnecessary. Such advisory opinions would violate "implicit policies embodied in Article III." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). *Amici* New Jersey et al. request an even more sweeping advisory opinion. They seek a declaration that *their* states' statutes, which have not even been considered in litigation in District Courts, and which may grant even fewer procedural protections of the liberty interest of people with mental retardation, would be found constitutional if they were challenged.

We believe the Court should reject these invitations to address issues not properly before it. Such a rejection is appropriate for all the reasons that led to the adoption of Rule 24.1(a). Petitioner's invitation would lead this

---

[5] It is the understanding of *amici* that the scope of this case is limited, in the words of the Kentucky statute, to commitment to "an ICF/MR." Ky. Rev. Stat. Ann. § 202B.040(3) (Baldwin 1991). Thus the Court does not have before it constitutional questions about the protections required for placement in group homes or the many other forms of community living arrangements. Those latter placements involve different (but far from insubstantial) constitutional interests. *See generally* Valpey, *The Psychological Impact of 18 Years in a Board and Care Home*, 10 J. Community Psychology 95 (1982) (first person account); Smull & Harrison, *Supporting People with Severe Reputations in the Community* (Alexandria, Va., National Association of State Mental Retardation Program Directors, 1992).

Court into an uncharted area of substantial constitutional complexity not fully considered by lower courts and commentators. In addition, it is very possible that there are issues that may not require constitutional resolution at all, as they may be redressible under federal legislation. Some forms of discrimination between different groups of persons with disabilities may be prohibited by the Americans with Disabilites Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. II 1990), which has not yet received judicial interpretation. Thus, the availability of statutory relief may obviate the necessity of reaching equal protection issues.

In order to be of assistance to this Court, *amici* will address both the specific due process and equal protection questions upon which certiorari was granted and the more general constitutional and practical contexts in which they arise.

II. THE "MASSIVE CURTAILMENT OF LIBERTY" SUFFERED BY ADULTS WITH MENTAL RETARDATION WHO FACE CIVIL COMMITMENT SHOULD BE RECOGNIZED AS BEING AMONG THE WEIGHTIEST OF CONSTITUTIONAL INTERESTS.

In cases involving mental illness, this Court has repeatedly recognized that civil commitment involves a "massive curtailment of liberty." *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)). The case at bar represents this Court's first consideration of procedural questions involving the commitment of adults whom the state seeks to confine because of mental retardation. Although the questions upon which the writ of certiorari was granted are narrow, this case represents an important cornerstone in the constitutional structure that will protect the liberty interest of people with mental retardation.[6]

[6] Kentucky's statutory definition of mental retardation closely tracks the American Association on Mental Retardation's (AAMR) previous version of the clinical definition. Compare Ky. Rev. Stat. Ann. § 202B.010 (Baldwin 1991) with AAMR, *Classification in Mental Retardation* 1 (Grossman ed., 1983). AAMR has recently reformulated the definition. Under the new definition, mental retardation

> refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992). The two definitions are not significantly different regarding the level or nature of intellectual impairment. The principal difference is the replacement of the unitary concept of "adaptive behavior" with more specific analysis of an individual's particular skill limitations that result from the intellectual handicap. *See* note 8, *infra*. In the view of *amici*, the difference between these two versions of the definition has no relevance to the case at bar.

Relying on archaic stereotypes about people who have mental retardation, Petitioner and supporting *amici* have attempted to minimize the importance of this liberty interest. *Amici* AAMR et al. disagree. This brief will analyze the relevant liberty interests in light of the professional literature, as well as self-reports by individuals with mental retardation describing the experience of institutionalization.[7]

[7] Institutionalization of people with mental retardation, of course, involves a liberty loss much broader and deeper than mere physical confinement. Every citizen's liberty includes an almost infinite range of life's freedoms, seemingly mundane and trivial in isolation but invaluable in the aggregate, from deciding to take a walk in the woods on a weekend afternoon or calling a friend. People in mental retardation institutions lose those freedoms. This brief will focus on only a few aspects of that loss.

A. Commitment of Adults to a Mental Retardation Institution Constitutes a Loss of Physical Freedom Fully Equivalent to the Deprivation in Other Kinds of Commitment.

This Court has recognized every citizen's physical freedom as a fundamental right, both for equal protection and substantive due process analysis. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992); *United States v. Salerno*, 481 U.S. 739, 750 (1987). Even when compared to other rights which the Court has recognized as fundamental, freedom from physical confinement has been treated as *sui generis*, meriting greater constitutional protection. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 25 (1981). The "'fundamental nature' of the individual's right to liberty," *Foucha*, 112 S.Ct. at 1785 (quoting *Salerno*, 481 U.S. at 750) is not reduced in any way because the individual whom the state is seeking to confine may have mental retardation. As one of the most distinguished leaders in the field of mental retardation observed, "There's nothing about retarded persons that should lead us to believe that they think less of their freedom than do other people." Blatt, *The Conquest of Mental Retardation* 832 (1987).

B. The Liberty Interest of Individuals at All Levels of Mental Retardation Is Equally Deserving of Constitutional Protection.

As this Court has noted, the label of mental retardation encompasses individuals with a range of levels of disability. *Penry v. Lynaugh*, 492 U.S. 302, 338 (1989); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985).[8] People with different levels of dis-

[8] Under the American Association on Mental Retardation's former system of classification, people with mental retardation were subdivided into four groups according to the severity of their intellectual disability: mild, moderate, severe, and profound. AAMR, *Classification in Mental Retardation*, *supra* note 6, at 13. AAMR has abandoned this subdivision based on intellectual functioning, as measured by IQ score. Thus the terms "mild," "moderate," "severe," and "profound" are no longer used. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports*, *supra* note 6, at 34. The new classification system subdivides the class on the basis of an individual's intensity of needed supports. It uses the classifications "intermittent," "limited," "extensive," and "pervasive" to describe the support the person needs in a particular area. *Id.* at 26. For example, an individual's diagnosis under the new system might be "a person with mental retardation who needs limited supports in communication and social skills." *Id.* at 34.

ability may experience their liberty—and its loss—in different ways, just as all people experience liberty in individual ways. But it is constitutionally and philosophically unacceptable to place a lower value on a person's liberty because of the severity of his disability.

The limitations that are caused by the disability itself are, of course, not the product of state action. On first impression, it might appear that a person with a substantial disability has less liberty for the state to take away. But the constitutional impact of commitment does not consist of "counting up" the elements of freedom the state has taken away. This view would mean that locking up an individual who uses a wheelchair is a smaller liberty deprivation than locking up a nondisabled person, because the former couldn't walk anyway. It therefore would follow that under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), fewer procedural protections would be required.[9]

The better view recognizes that the liberty deprivation is of equal constitutional weight regardless of the degree

[9] This same logical perspective would hold that the liberty interest of an arrested wealthy financier is worthy of greater protection than that of an indigent person because the former had more options for the enjoyment of his freedom, or that a person with a speech impediment has diminished rights under the First Amendment. To reduce constitutional protections on such a theory would surely violate equal protection principles.

of an individual's disability. Thus, in our example, the individual who uses a wheelchair suffers a constitutionally equivalent liberty deprivation because the state has taken away 100% of his mobility rights outside the confines of the institution, just as it has taken away 100% from a marathon runner whom it has institutionalized. Similarly, an individual whose mental disability requires more extensive supports in various skill areas loses all the liberty that he would otherwise be able to enjoy, including choosing his own friends and companions, selecting daily activities, deciding what to eat, and retaining a level of personal privacy, among others. It is both futile and constitutionally impermissible to attempt a calibration, either fine or gross, of losses of liberty according to the severity of a person's disability.

Amici believe that by rejecting Petitioner's approach, the Court can assure that each individual's liberty is recognized (and protected) equally, and guarantee that invidious discrimination does not infect due process doctrine under the guise of "value judgments" that one citizen's freedom is "more valuable" than another's. *Cf.* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. II 1990).

Petitioner also attempts to minimize the extent of the liberty deprivation inherent in commitment by implying that adults with mental retardation are not truly adults. The stereotype of individuals with mental retardation as "perpetual children" has long been part of the justification for what this Court has recognized as a "grotesque" history of mistreatment. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); *id.* at 461 (Marshall, J., concurring in part and dissenting in part). *See* R. Dybwad, *Perspectives on a Parent Movement: The Revolt of Parents of Children with Intellectual Limitations* (1990). This Court has recognized that analogies between adults with mental retardation and nondisabled children have limited utility. *Penry*, 492 U.S. at 339 (O'Connor, J.).

In the past twenty years, at the urging of adults with mental retardation and their families, professionals have been reconsidering what adulthood means for people with mental retardation. These efforts have increasingly focused on the importance of facilitating the transition to adulthood, and governmental efforts have been directed toward the same goal. *See, e.g., Transitions to Adult Life for People with Mental Retardation—Principles and Practices* (Ludlow, Turnbull & Luckasson eds., 1988); McNair & Rusch, *Parent Involvement in Transition Planning*, 29 Mental Retardation 93 (1991); Wehman et al., *Transition from School to Work: New Challenges for Youth with Severe Disabilities* (1988); Individuals with Disabilities Education Act, 20 U.S.C.A. § 1401(a)(20)(D) (Supp. 1992). It would be inconsistent with constitutional norms to allow Kentucky to deny the adulthood of people with mental retardation and treat them as if they were children on the basis of "archaic and stereotypic notions" that may become "a self-fulfilling prophecy," *see* Dexter, *A Social Theory of Mental Deficiency*, 62 Am. J. Mental Deficiency 920 (1958); *cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 725, 730 (1982).

C. The Curtailment of Liberty Inherent in Any Commitment Is Exacerbated by the Likelihood that the Individual Will Be Subjected to Involuntary Medication with Psychotropic Drugs.

Contrary to Petitioner's suggestion, Pet. Br. at 32, the scope of the liberty interest at stake in a commitment to a mental retardation institution is magnified by the likelihood that the committed individual may be involuntarily medicated with psychotropic drugs. This Court has recognized the nature of the treatment that occurs during confinement is part of the measure of the liberty deprivation. *Vitek*, 445 U.S. at 492. The Court has also recognized that the involuntary administration of psychotropic medications is, in itself, "a substantial interference with

[an individual's] liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). Such medication practices have been held to require a substantial "overriding justification." *Riggins v. Nevada*, 112 S. Ct. 1810, 1815 (1992). "Mentally retarded people are among the most medicated populations in our society." Agran & Singh, *Pharmacological Intervention, in Handbook of Mental Retardation* 347, 348 (Matson & Mulick eds., 2d ed. 1991). The "unwanted side effects" of these drugs, *Riggins*, 112 S. Ct. at 1818 (Kennedy, J., concurring), can be particularly debilitating on the ability of people with mental retardation to learn and to cope with tasks in their everyday lives. *See, e.g.*, Plotkin & Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 Stan. L. Rev. 637, 644-49 (1979) and studies cited therein.

Although these drugs have been developed for mental illness, their overuse in mental retardation institutions is alarming. A large percentage of institution residents are subjected to psychotropic medications. *See, e.g.*, Hill, Balow & Bruininks, *A National Study of Prescribed Drugs in Institutions and Community Residential Facilities for Mentally Retarded People*, 21 Psychopharmacology Bull. 279, 283 (1985) (37.9% of institutional residents receiving psychotropic medications, with only 2.9% prescribed for a medical condition and the remainder for "overactive behavior");[10] Intagliata & Rinck, *Psychoactive Drug Use in Public and Community Residential Facilities for Mentally Retarded Persons*, 21 Psychopharmacology Bull. 268, 270 (1985) (antipsychotic medications administered to 45% of institutional residents, with

---

[10] *Cf. Riggins*, 112 S. Ct. at 1815 (requiring, *inter alia*, "a determination of medical appropriateness"). *See generally* Bates, Smeltzer & Arnoczky, *Appropriate and Inappropriate Use of Psychotherapeutic Medications for Institutionalized Mentally Retarded Persons*, 90 Am. J. Mental Deficiency 363 (1986) (between 39% and 54% of the prescribed medications are inappropriate for the conditions diagnosed).

the frequency unrelated to the clients' functional skill levels).

Thus there is a substantial likelihood that an individual committed to a mental retardation institution will be subjected to involuntary medication with psychotropic drugs.[11] This prospect adds weight to the already "massive curtailment of liberty" involved in civil commitment.

D. The Stigmatization of Civil Commitment and Its Official Attachment of the Label of Mental Retardation Is Keenly Felt by Individuals Committed to These Institutions.

Despite assertions by Petitioner and supporting *amici*, the stigmatization that accompanies mental retardation commitment has a substantial effect on committed individuals, and is at least equivalent in its impact to the stigmatization experienced by mental health patients.[12] *Cf.* Pet. Br. at 31-32. The impact of this stigmatization was first recognized in the professional literature at least a quarter of a century ago. *See* Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967). This pioneering study revealed that individuals released from retardation institutions were so

---

[11] Serious problems involving administration of psychotropic medications to institutionalized persons with mental retardation have also been found by lower courts, generally in the context of challenges under the Due Process Clause. *See, e.g., Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1186-88 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 373 (1990).

[12] With both mental illness and mental retardation, some stigma will result from other individuals' perception of the disability itself. *See Addington*, 441 U.S. 418 (1979). This brief will address only the additional stigmatization caused by the commitment and the official attachment of the label of "mental retardation." *See* Reiss & Benson, *Awareness of Negative Social Conditions Among Mentally Retarded, Emotionally Disturbed Outpatients*, 141 Am. J. Psychiatry 88 (1984).

concerned about the stigma they encountered that many had fabricated lies to account for the time of their confinement. *Id.* at 148-49. Subsequently, the virulence of the stigmatization process for people with the label of mental retardation has been confirmed.[13]

But the impact of stigmatization can be seen even more clearly in first person accounts by people with mental retardation about the role of commitment and labeling in their own lives. *See, e.g.*, Bogdan & Taylor, *Inside Out: The Social Meaning of Mental Retardation* (1982) ("The problem is getting labeled as being something. After that you're not really a person. It's like a sty in your eye—it's noticeable."); *"I've Seen It All!": Lives of Older Persons with Mental Retardation in the Community* (Edgerton & Gaston eds., 1991). *See generally*, Stanovich & Stanovich, *Speaking for Themselves: A Bibliography of Writings by Mentally Handicapped Individuals*, 17 Mental Retardation 83 (1979).

E. The Massive Curtailment of Liberty that Accompanies Commitment Includes the Possibility of Aversive Conditioning, Potential Physical Abuse, Regression of Previous Skills, and the Loss of Freedom of Association.

Confinement to a regimented routine in an institutional setting affects almost every aspect of the freedom that

---

[13] *See, e.g.*, Gibbons, *Stigma Perception: Social Comparison Among Mentally Retarded Persons*, 90 Am. J. Mental Deficiency 98 (1985); Angrosino, *Metaphors of Stigma: How Deinstitutionalized Mentally Retarded Adults See Themselves*, 21 J. Contemp. Ethnography 171 (1992); Zetlin & Turner, *Self-Perspectives on Being Handicapped: Stigma and Adjustment, in Lives in Process: Mildly Retarded Adults in a Large City* 93 (Edgerton ed., 1984); Szivos & Griffiths, *Group Processes Involved in Coming to Terms With a Mentally Retarded Identity*, 28 Mental Retardation 333 (1990).

This Court has already witnessed the impact of stigmatization of people with mental retardation on the unwillingness of a community to permit people with the disability to live in a group home. *Cleburne*, 473 U.S. at 448.

individuals ordinarily enjoy.[14] Civil commitment impairs not only the ability of individuals to move about freely but also a wide range of freedoms that affect almost every right imaginable. *See* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1108, 1158-61 (1972).

People in mental retardation institutions are often subjected to behavior modification programs that include aversive conditioning including seclusion and physical restraints. *See Lelsz v. Kavanagh*, 673 F. Supp. 828 (N.D. Tex. 1987), *rev'd on other grounds*, 824 F.2d 372 (5th Cir. 1987). *Cf. Vitek v. Jones*, 445 U.S. 480, 492 (1980). *See also Youngberg v. Romeo*, 457 U.S. 307, 317-25 (1982). They may also be the subjects for experimentation. *See, e.g.*, Rothman & Rothman, *The Willowbrook Wars* 260 (1984). An ironic consequence of institutionalization is that many people lose skills they had prior to commitment. *See generally, Romeo*, 457 U.S. at 327 (1982) (Blackmun, J., concurring).

Mental retardation institutions have also been the location of serious cases of physical abuse of residents. *See* Marchetti & McCartney, *Abuse of Persons with Mental Retardation: Characteristics of the Abused, the Abusers, and the Informers*, 28 Mental Retardation 367 (1990); Rothman & Rothman, *The Willowbrook Wars* 15-18; Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Inquirer: The Philadelphia Inquirer Magazine, May 27, 1984, at 18, 23 (serious beating by institutional staff following litigation in this Court).

---

[14] A recent study for the National Association of State Mental Retardation Program Directors illustrates this point with a Swiftian proposal for governmental labelling, classification, and regulation of a group of nondisabled individuals. Smull & Harrison, *Supporting People with Severe Reputations in the Community* 5-6 (Alexandria, Va., National Association of State Mental Retardation Program Directors 1992).

Sadly, the intrusive infringements on liberty do not always end with release from civil commitment. For a disturbing example, *see* Ficker-Terrill & Rowitz, *Choices*, 29 Mental Retardation 63 (1991).

Each of these effects of commitment would be seen, correctly, as a substantial liberty deprivation if imposed by the state on nondisabled individuals. They are no less substantial when imposed on people with mental retardation.

III. THE LIBERTY INTEREST OF PEOPLE WITH MENTAL RETARDATION DESERVES RIGOROUS PROTECTION UNDER THE DUE PROCESS CLAUSE.

A. Procedures for Civil Commitment of People with Mental Retardation Must Assure a Fair and Accurate Adjudication of the Statutory Criteria.

The principal message of this Court's teachings on the procedural meaning of due process is that states must provide a fair and accurate adjudication of the statutory criteria for deprivations of constitutionally protected interests. This involves a balancing of competing private and public interests in light of the likelihood that requested procedural protections would increase the accuracy of the adjudication. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The first inquiry under *Mathews* is the nature of the individual's liberty interest. As indicated in the previous section, the interest of a person whom the state wants to officially label as having mental retardation and whom it wants institutionalized for a significant period of time is extremely weighty. The individual stands to lose, *inter alia*, the right to make choices about where he will live, with whom he will live, how he will spend his time, whether to be subjected to psychotropic drugs and aversive conditioning, whether he will have any degree of personal privacy, and whether he will face the stigmatization of the official label of "mental retardation" far beyond the duration of the commitment. Indeed, there are few things states do to citizens that affect an individual more profoundly and in more ways than commitment to a mental retardation institution.

The other factors in the *Mathews* balance can only be considered in the context of particular procedural protections that the state declines to provide but which the individual requests. Petitioner's request for an advisory opinion raises the question of whether there is a right to a hearing at all. The middle factors of the *Mathews* test would then inquire about the likelihood that a system with no right to a hearing will produce erroneous results, and the probability that the opportunity for a hearing would reduce the rate of errors. But before these factors can be analyzed, it is necessary to focus on what an "error" would mean. Errors, for constitutional purposes, refer to all false positives—cases where the commitment of an individual does not meet the statutory criteria for commitment. Thus, the constitutional question cannot be addressed in isolation from the statutory criteria.

Under Kentucky's statute, a person can be committed to an institution only upon a finding of each of these elements:

(1) The person is a mentally retarded person;

(2) The person presents a danger or a threat of danger to self, family or others;

(3) The least restrictive alternative mode of treatment presently available requires placement in an ICF/MR; and

(4) Treatment that can reasonably benefit the person is available in an ICF/MR.

Ky. Rev. Stat. Ann. § 202B.040 (Baldwin 1991).

Thus under the Kentucky statutory system, a finding of mental retardation alone would not be sufficient;[15]

---

[15] If the statute permitted commitment on a mere finding of mental retardation alone, it would be of questionable constitutionality under the substantive meaning of the Due Process Clause. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("[T]here is . . . no constitutional basis for confining [mentally ill] persons involun-

there must also be a finding that the individual is prospectively dangerous, that there is no less drastic means of addressing this danger than confinement, and that available treatment is likely to be beneficial to the individual.[16] Thus, errors would include the mistaken commitment of an individual who did not have mental retardation (a relatively rare, but not unheard-of, occurrence).[17] But equally erroneous would be the commitment of an individual who *had* mental retardation but who posed no danger, or whose dangerousness (particularly in the form of reduced self-care skills) could be addressed by means less restrictive than institutionalization or for whom institutionalization was unlikely—on balance—to be beneficial. *See generally Clark v. Cohen*, 613 F. Supp. 684, 686-87 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir. 1986), *cert. denied*, 409 U.S. 962 (1986).

---

tarily if they are dangerous to no one and can live safely in freedom.").

[16] Significantly, Petitioner omits several of the statutory criteria in his description of the Kentucky system, stating that "[t]he issues are whether the ward is mentally retarded and whether he can benefit from the available habilitation services CHR can provide." Pet. Br. at 26. Even wider of the mark is *amicus* New Jersey, who seeks to differentiate the purpose of mental retardation commitment from commitment for mental illness because the latter's purpose is "particularly to deal with circumstances where because of mental illness, a person is a danger to himself or others." N.J. *Amicus* Br. at 8-9. This is almost precisely the wording of Kentucky's mental retardation statute.

[17] *See, e.g.*, Valpey, *The Psychological Impact of 18 Years in a Board and Care Home*, 10 J. of Community Psychology 95 (1982); Turner, *Yes I Am Human: Autobiography of a "Retarded Career,"* 8 J. of Community Psychology 3 (1980); Edgerton, *A Case of Delabeling: Some Practical and Theoretical Implications, in Culture and Retardation: Life Histories of Mildly Retarded Persons in American Society* 101, 105 (Langness & Levine eds., 1986) (reporting eight cases of false labeling out of a group of 48 individuals diagnosed with mild mental retardation, as well as estimating that two California developmental centers discovered 50 such cases in 1980).

It is generally understood that due process requires a hearing for such a finding. *See generally Addington*, 441 U.S. 418. Indeed, this Court ordered substantial procedural protections in *Vitek*, 445 U.S. 480, for individuals whose liberty interest was substantially smaller than that of individuals proposed for mental retardation commitment. Plaintiffs in *Vitek* were already prisoners whose physical liberty was not at stake. By contrast, individuals in Kentucky who have not been committed are entitled to the full range of liberty interests enjoyed by all citizens.

B. The Kentucky Statutory Scheme at Issue in This Case Fails To Provide Adequate Procedural Protections.

The procedural question actually presented by this case is both narrower and more difficult than the necessity of a hearing for the involuntary commitment of an adult. The only due process issue properly in the case is whether it is permissible to grant the right to participate in proceedings "as if a party," and to confer "standing to appeal an adverse decision" to guardians and "immediate family members" when the liberty of an adult is at issue. Ky. Rev. Stat. Ann. § 202B.160(3).

In the resolution of this question, it is important first to note what it is not: this is not a question about the role of the parents of minor children. *Cf. Parham v. J.R.*, 442 U.S. 584 (1979). The individuals whose commitments are sought under the challenged statutes are not minors, and their parents, unless appointed as guardians in a judicial proceeding, have no more legal authority over their lives than do the parents of other adults.[18] The mere fact of an individual's disability (which, of course, has not yet

---

[18] The adults in this case whose parents seek their commitment are not analogous to the minor children in *Parham*. The closest analogy is Kenneth Donaldson, an adult whose parents sought his commitment. *O'Connor*, 422 U.S. at 565.

been established at the stage of the proceedings under discussion) does not deprive him of the right to adulthood. Thus Petitioner's reliance on *Parham* as constitutional authority is misplaced.

Legal questions aside, the relationship between adults who may have mental retardation and their parents is complex. As a starting point, it is clear that the majority of parents of adults with mental retardation care deeply about their sons and daughters.[19] As with the parents of nondisabled children, this interest does not end when the son or daughter becomes an adult. Many parents take an ongoing, caring, and sometimes intense interest in the welfare of their sons and daughters.

However, the interest of these parents may be manifested in very different ways. Social science research makes clear that for a substantial number of parents, concern about the future of their sons and daughters (and particularly their fate after the death of the parents) leads them to a strong bias toward institutionalization. *See, e.g.*, Frohboese and Sales, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution*, 4 Law & Human Behavior 1, 39 (1980). Such parents often resist community placement for their son or daughter. However, the "overwhelming majority of parents become satisfied with community settings once their son or daughter has moved from the institution, despite general predispositions to the contrary." Larson and Lakin, *Parent Attitudes About Residential Placement Before and After Deinstitutionalization: A Research Synthesis*, 16 J. Ass'n for Persons with Severe Handicaps 25, 37 (1991).

---

[19] By contrast, some parents do not maintain contact after confinement and cannot even be located by the institutional staff. *See, e.g.*, Rothman & Rothman, *The Willowbrook Wars* 165 (1984). The language of the Kentucky statute grants the right to intervene to parents and other relatives regardless of their involvement with (or concern for) the individual whose commitment is sought.

If the due process question were whether parents should be given the authority to commit their adult son or daughter without a hearing, the high risk of error would require an independent hearing. But in the statute at issue in this case, Kentucky has given parents a different role. Parents, under the Kentucky statute, are treated as if they were parties and given specific authorization to appeal "any adverse decision." Granting parents such an intrusive role violates due process rights of their sons and daughters.

Parents clearly possess relevant information about their son or daughter that may aid the trier of fact in determining whether the individual meets the statutory criteria for commitment. In *Mathews* terms, procedures that assure that parents' information and perspective are brought to the attention of the decision-maker are acceptable because they reduce, rather than increase, the risk of error. Some features of Kentucky's statutory scheme can be viewed in this light. For example, parents may be members of the "interdisciplinary team" that makes service recommendations for the individual and can appear as witnesses at the commitment hearing and present evidence regarding their child's needs.

Other features of the statute appear not to be designed to permit parents to present relevant information, but rather to pursue directly their own interests "as if a party." In this category are the statutory rights to be represented by their own counsel and to cross-examine witnesses. Ky. Rev. Stat. Ann. § 202B.160(3). These features do not fit so easily within the *Mathews* format since their goal is not to affect the error rate in a dispute between two parties, but rather to bring the interests of another party to the proceedings. Thus, in structure, these provisions are more analogous to rules concerning intervention of right in civil litigation. Such intervention is limited to those with separate interests at stake that are not adequately protected by the existing

parties. *See, e.g.*, Fed. R. Civ. P. 24(a). While parents have information relevant to Kentucky's commitment criteria, those criteria relate solely to the individual whose commitment is sought, and involve no separate interests of the parents.[20]

Surely a state could not grant party status and the ability to appeal an order of community placement to anyone who lives in the immediate neighborhood. But why would this violate due process? The *Mathews* test is not very helpful here, because the central problem is not that inclusion of such "parties" increases the likelihood of error. The real concern is that the parents, even though they might possess relevant information and care deeply about the respondent, are not the person whose liberty is at risk, and thus cannot be given a stake in the proceedings under the type of intervention rules that apply to ordinary disputes. *Cf.* Fed. R. Civ. P. 24. Could a state grant status "as if a party" in parental termination proceedings to every child's schoolteacher, granting the teacher the right to appeal an order denying termination? Such a teacher may care deeply for the child, and may have relevant information, but the parent's liberty interest must outweigh these considerations. *See generally Santosky v. Kramer*, 455 U.S. 745, 758-60 (1982).

Even further removed from the information-providing model is the provision that allows parents to appeal "any adverse decision." Ky. Rev. Stat. Ann. § 202B.160 (3). On its face, this provision might appear ambiguous: adverse to whom? But read in context, it semes likely that the legislature intended it to mean "adverse to the wishes of the parents." If the provision meant "adverse to the individual whose commitment is sought," parents would not have authority to appeal a denial of the commitment petition. Thus the statute would grant to parents the right to appeal a decision for a community placement that both the individual and the state (and its mental retardation professionals) agree is lawful and in the individual's best interest. It is the constitutionality of this provision that is most troubling.

[20] A decision made at the commitment hearing not to institutionalize does not necessarily mean that the individual must live with his parents. Community living arrangements, such as group homes, exist for individuals with mental retardation.

The balancing of interests here is somewhat different than traditional due process cases. A state statute grants to a third party the power to appeal a decision for a community placement which the affected party and the petitioner (who may be the state) find satisfactory. What is the parent's interest in such a scenario? It must be the desire to keep the adult in an institution because the parent believes it is a "better" place than the community placement, or, more likely, because such a parent is more comfortable envisioning it as a more permanent fixture, believing it to be an edifice unlikely to close in the future, when the parent is no longer able to look out for the adult son or daughter.

What is the interest of an adult with mental retardation in avoiding an appeal of a decision that is satisfactory to both the individual and the petitioner? In one sense the interest is in liberty itself—reducing the likelihood that the satisfactory decision that allows more freedom will be overturned because of political pressure or emotional arguments made by the parent. But in a very real sense, the interest is in autonomy. Few adults, whether disabled or not, want their parents, however lovingly-motivated, to continue controlling their destiny. An analogy might be found in portions of this Court's analysis of spousal consent and notification in abortion cases. The Court has noted the husband's "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying," but held it unacceptable to grant him a veto because a vital liberty interest of the pregnant woman was constitutionally superior. *Planned Parenthood of*

Central Mo. v. Danforth, 428 U.S. 52, 69 (1976). *See also Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2831 (1992) ("A husband has no enforceable right to require a wife to advise him before she exercises her personal choices.")[21]

It is the adult whose commitment is sought who stands to suffer the "massive curtailment of liberty" described above. When he has not been adjudicated incompetent and when his parents have not been appointed his guardian,[22] those parents, however loving and well-motivated, have no "enforceable right" to govern his "personal choices." They can advise, they can provide information, but they cannot insist on their peace of mind taking precedence over their son's or daughter's right to liberty.

In the view of *amici*, Kentucky acted properly in providing parents a forum in which to provide relevant information and to make a case, including vigorous argument, about what they believe would be in their adult son or daughter's best interest. But Kentucky exceeded the bounds of due process when it permitted parents to intrude in the case, not to speak on behalf of their son's or daughter's interest, but instead to advance their own.[23]

---

[21] The situation that presents the closest factual analogy to this provision would be if a state permitted third parties to appeal acquittals in criminal cases. Of course, such a case would never be decided as a matter of due process because it would involve other constitutional problems such as double jeopardy.

[22] This case does not present the issue of limitations on the power of guardians in the commitment of their wards. This is a question on which lower courts (and commentators) are in disagreement. It is clear that there are some issues that are so consequential or intensely personal that it would be impermissible to allow guardians to decide them for their wards, such as voting or selection of a marriage partner. Other issues may require a hearing before an impartial fact-finder, to assure compliance with statutory and constitutional criteria in cases involving fundamental liberties and to allow appellate review.

[23] The constitutional problems with this provision are even clearer when its imprecise scope is analyzed. The right to participate "as

IV. EQUAL PROTECTION REQUIRES THAT STATES ACT EVEN-HANDEDLY WHEN DEPRIVING INDIVIDUALS OF THEIR PHYSICAL LIBERTY.

People with mental retardation are not identical to people with mental illness, and the adjudication of commitment cases involving these two forms of disability need not be identical. For example, Kentucky employs an interdisciplinary team in the mental retardation commitment process but apparently does not do so in cases involving mental illness. *Amici* believe that states should be allowed reasonable latitude to devise procedures most likely to produce fair and accurate results based on the kinds of factors those cases involve.[24]

But the Equal Protection Clause imposes strict limits on the ability of the state to treat groups in substantially different ways when physical liberty is at stake. "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason . . . for such discrimination." *Foucha v. Louisiana*, 112 S. Ct. 1780, 1788 (1992).

Clearly the Due Process Clause provides the principal measure of the constitutionality of procedural protections of liberty. On some occasions, this Court has declined to analyze differential treatment regarding procedural

---

is a party" is granted not only to parents and guardians but to all "immediate family members." Ky. Rev. Stat. Ann. § 202B.160(3) (Baldwin 1991). This term is undefined in the statute, and is not limited to family members who have any involvement in the life of the individual or who have previously expressed concern for him. At some point, there must be a due process limit to the ability of the state to grant party status to individuals other than the petitioner and the respondent.

[24] In other contexts, this Court has indicated that states are free to enact reasonable regulations of fundamental rights so long as they do not impair liberty interests for disfavored groups. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978).

rights under equal protection analysis, choosing instead to invalidate the laws under the Due Process Clause. *See, e.g., In re Gault*, 387 U.S. 1 (1967). On other occasions, it has used the Equal Protection Clause to require states to offer procedural rights to a group facing the loss of a fundamental right because the state has given those rights to another group, even when it is clear that the Due Process Clause would not have required the right be given to either group. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963).[25] The equal protection challenge to Kentucky's different burdens of persuasion raises such an issue.[26]

In adopting the "beyond a reasonable doubt" standard for mental illness commitments, the Kentucky legislature has made a value judgment about the weight it wants to give to the liberty interest to be free from civil commitment. It was free to assign it a lesser weight, as measured by the burden of persuasion, but declined to do so.[27] Having made that judgment, it is not free to give lesser weight to the liberty interest of another group

---

[25] As respected commentators have observed,

> When the government takes actions that burden the rights of a classification of persons in terms of their treatment in a criminal justice system it is proper to review these laws under the strict scrutiny standard for equal protection. However, it is often unnecessary to resort to equal protection analysis because the legitimacy of the law may be determined by the substantive interpretation of a specific guarantee of the Bill of Rights.

Nowak & Rotunda, *Constitutional Law*, § 14.41 at 890 (4th ed. 1991).

[26] *Amici* assume that this Court would find its due process analysis concerning mental illness, *Addington*, 441 U.S. 418, to be equally applicable in cases involving mental retardation.

[27] Kentucky's adoption of the "beyond a reasonable doubt" standard for mental illness commitments predates the *Addington* decision, but Petitioner indicates that the legislature has subsequently rejected attempts to lower the standard to "clear and convincing evidence." Pet. Br. at 28-29.

without "a particularly convincing reason." *Foucha*, 112 S. Ct. at 1788.[28]

This is an important principle. If states were free to protect the fundamental rights of some groups more rigorously than they protect others, it would be an invitation to "pick and choose" groups for greater or lesser protection of fundamental liberty interests based on their political clout, public disfavor, or stereotyped views. Kentucky's legislation does just that. Kentucky has chosen to endorse a "perpetual child" view of adults with mental retardation, and thus devalue their right to liberty. Similarly, the statute invalidated by the Court of Appeals appears to have been the product of political clout that individuals with mental retardation simply cannot match.[29]

Although states should be free to adopt different procedural details in commitment statutes for different groups, they must be supported by valid justifications and cannot amount to valuing the liberty of one group more highly than that of another, disfavored group. These principles require that Kentucky's use of different standards of proof be held to violate equal protection because,

---

[28] Petitioner has argued that a smaller liberty interest is at stake in mental retardation commitments than in mental illness commitments. Pet. Br. 31-32. If anything, the individual interest at risk in mental retardation cases is greater than that in mental illness cases. The average duration of a mental retardation commitment is much longer, and may last, in Petitioner's words, "their entire lives." Pet. Br. 31.

[29] This Court has observed that the interests of people with mental retardation have, in other contexts, received a favorable hearing in some legislative bodies. *Cleburne*, 473 U.S. at 443-45. It is significant that those issues, such as entitlement to special education, are questions on which there is no potential conflict between people with disabilities and their parents. The reality is that legislation that addresses the needs of people with mental retardation is almost always the product of political action by parents and professionals in the field.

as the Court of Appeals found, the state has offered no such justification.[30]

CONCLUSION

For the aforementioned reasons, *amici* urge the affirmance of the judgment of the Court of Appeals.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
MAUREEN A. SANDERS
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

January 11, 1993

[30] Since *amici* believe that the parental provisions of the Kentucky law violate due process, we do not address whether they also violate equal protection. The state has offered no justification for allowing the parents in mental retardation cases to participate "as if a party" while protecting adults in mental illness cases from intervention by their parents and other relatives.